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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1130

LEONARD E. NOREN and HARRY C. PERRY,
Petitioners,

vs.

ROBERT E. McCARTHY, Successor to WALTER E. BECK, as Manager of the United States Land Office at Sacramento, California,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply of Petitioners to Respondent's Brief in Opposition

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This reply is submitted solely for the purpose of calling attention to the material error of fact appearing on page 4 of respondent's brief. Referring to the Order of Remand by the District Court, the brief (p. 4, line 11) states: "The decision clearly terminated the litigation by setting aside the action complained of." The record not only fails to support this statement of alleged fact but absolutely refutes it.

Far from "setting aside the action complained of" by petitioners, the District Court remanded the cause to respondent and "to the Bureau of Land Management of the United States Department of the Interior for the purpose of setting aside said rejections (of petitioners' applications), and each of them, and conducting further hearings consistent with the findings of this Court." (R-155-6; Pet. App. 9-10)

In other words, all the corrective steps found by the trial Court to be essential to due process, including the setting aside of previous erroneous action by the respondent, were left to the administrative agency, a procedure recognized as the preferred method of assuring avoidance of encroachment on the administrative field by the judiciary.

The prayer of petitioners' complaint, as filed in the trial Court, was for the setting aside of the rejections of their applications and the allowance of the same. (R-6, 7) The trial Court made no attempt to dispose of any element of this prayer. The finality requisite to bring the District Court's action within the appellate jurisdiction provided by 28 U.S.C.A. 1291 is thus completely lacking.

The procedure followed in this cause was virtually identical with that receiving the approval of this Court in *Ford Motor Co., v. NLRB.,* 305 U.S. 364, 372. While in that case, it is true that the administrative agency requested a remand of the cause, such request had no bearing on the propriety of the procedure. The *Ford Motor Case* was cited recently with tacit approval in *Burlington Truck Lines v. U.S.,* 371 U.S. 156, 172 (1962).

It may be pointed out that this case presents only one simple issue and includes no ancillary issues and no complicating factors such as this Court had before it in the cases of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, and *Gillespie v. U.S. Steel Corp.,* 379 U.S. 148, cases cited by respondent.

CONCLUSION

It is respectfully submitted that respondent has failed in his effort to infiltrate any semblance of finality into the action of the District Court in this matter and has presented no sufficient grounds for denying the petition herein.

Dated: May 19, 1967

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